Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 84-940

JEFFREY WAYNE ABBETT,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

J. MICHAEL EAKIN
DISTRICT ATTORNEY
ATTORNEY FOR RESPONDENT

CUMBERLAND COUNTY COURTHOUSE
CARLISLE, PENNSYLVANIA 17013
PHONE: (717) 249-1133, EXT. 231

QUESTION PRESENTED

Did the trial court's failure to specifically instruct the jury that the defendant had to have "actual knowledge" of the nature of the controlled substance he possessed deprive the defendant of a fair trial and his right to a trial by jury?

ANSWER OF THE COURT BELOW: NO.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinions Below.....	1
Statutes Involved.....	2
Statement of the Case.....	3
Reasons in Opposition of Certiorari.....	6
Conclusion.....	13
Appendix A.....	A1
Appendix B.....	B1

TABLE OF AUTHORITIES

	Page
Cases:	
Commonwealth v. Miley, ___ Pa. Superior Ct. ___, 460 A.2d 778 (1983).....	7
Commonwealth v. Rambo, 488 Pa. 334, 412 A.2d 535 (1980).....	7 & 9
Commonwealth v. Sisco, 484 Pa. 85, 398 A.2d 955 (1979).....	7

OPINIONS BELOW

The relevant opinion of the Superior Court of Pennsylvania (Appendix A) is unreported. The relevant opinion and order of the Cumberland County Court of Common Pleas (Appendix B) is also unreported.

STATUTES INVOLVED

There are no statutes cited by the Commonwealth.

STATEMENT OF THE CASE

Factual History

The facts of this case established that on October 16, 1981, at about 2:50 a.m., two troopers of the Pennsylvania State Police stopped a van about three and one half miles east of the Carlisle, Pennsylvania interchange on the Pennsylvania Turnpike. The reason for the stop was that the van had a television mounted in a position where it would be visible to the driver, a violation of Pennsylvania law.

Upon approaching the van, one of the troopers spotted a brick of marijuana lying in the rear of the van, in plain view. The van was eventually taken

to a state police barracks where a search was performed pursuant to a valid warrant. The search yielded approximately 250 pounds of marijuana, contained in boxes in the rear of the van. The driver of the van was the defendant, Jeffrey Wayne Abbett. A passenger was also present, Richard DiMatteo.

Procedural History

The defendant was arrested and charged with Unlawful Possession with Intent to Deliver a Schedule I, Controlled Substance and Conspiracy. Both charges were bound over at a preliminary hearing on October 22, 1981. The defendant filed suppression motions, which were overruled. A jury trial was held on February 17, 1982, and the defendant was found guilty (the Conspiracy charge was dropped by

the Commonwealth). The defendant's post-trial motions were denied, and he appealed to the Superior Court. The Court of Common Pleas' decision was affirmed on this appeal. Allocatur was denied by the Pennsylvania Supreme Court, and this application for certiorari followed.

REASONS IN OPPOSITION OF CERTIORARI

I. NO DENIAL OF FEDERAL DUE PROCESS AROSE FROM THE INSTRUCTIONS GIVEN TO THE JURY BY THE TRIAL COURT.

The defendant believes that the trial court was constitutionally required to instruct the jury that they had to find beyond a reasonable doubt that he had actual knowledge of the presence of the marijuana in his van. He believes that the failure to specifically instruct on this "actual knowledge" element deprived him of a fair trial, and so violated due process. The Commonwealth submits that, under the law of Pennsylvania, the charge to the jury adequately covered the elements of the charged offense. Furthermore, it is submitted that the matter the defendant complains of is, in actuality, not a federal matter.

In Pennsylvania, as elsewhere, it is well recognized that a court may

use its own language in charging the jury, rather than that proposed by counsel. Commonwealth v. Sisco, 484 Pa. 85, 398 A.2d 955 (1979). The defendant claims that his "actual knowledge" instruction, however, must be specifically stated. He cites Commonwealth v. Rambo, 488 Pa. 334, 412 A.2d 535 (1980), as his authority. Rambo, however, never discussed the necessity for such an instruction. Rambo does require that there must be some evidence to show the defendant knew he was in possession of a controlled substance. This element of knowledge, however, is often framed in terms of "control" in the state of Pennsylvania. See, Commonwealth v. Miley, ___ Pa. Superior Ct. ___, 460 A.2d 778 (1983). A court is therefore free to express this element of knowledge

in terms of control, and need not instruct a jury using the defendant's terminology.

The trial court, consistent with this state's law regarding possession of a controlled substance with intent to deliver, used its own langauge in framing the instruction to the jury regarding the intent to control necessary for possession:

> Now, from that testimony of the police officers the Commonwealth is asking that you find that the defendant possessed this marijuana, that he possessed it means that he had the right to control it, and they're asking you to find that from the testimony that he assumed possession of Exhibit 10, which is the one that will go out with you, and delivered it to the officers and that he apparently was in control of the vehicle; he was driving it. And the testimony that he suggested to the passenger that he look in the glove compartment for the owner's card, and so.
>
> And from that testimony the Commonwealth is asking that

> you find that he was in possession, or at least in joint possession, of the, whatever it is, with the other passenger, with the passenger in the car, Mr. DiMatteo, who was here in the courtroom and you saw him sitting in the back. He was referred to a couple of different times.

Notes from Jury Trial, at pages 190-191. The instruction was adequate. The language used hardly constitutes a denial of due process.

The defendant's claims do not rise to the level of a constitutional dilemma, and indeed do not even involve a federal matter. A state may define possession with or without the element of "actual knowledge." If such knowledge is required, as Rambo, supra, suggests that it is in Pennsylvania, the state is again free to establish that element in a criminal trial in any number of ways. In this case, the jury found

that the defendant had control of the van and the drugs, and from that fact and other circumstances concluded that he knew he was in possession of marijuana. According to this state's law that is perfectly permissable. The refusal of Pennsylvania courts to grant the defendant relief on the issue now brought before this Court only reinforces this conclusion.

Certiorari should not be granted in this case by this Court. Not only does the record reflect that the defendant received a fair trial, but the defendant has failed to present any issues that directly implicate federal law.

II. NO VIOLATION OF THE SIXTH AMENDMENT AROSE FROM THE FORM OF THE JURY INSTRUCTION.

The defendant alleges that a failure to specifically instruct on "actual knowledge" constituted a directed verdict of guilty and a denial of the sixth amendment right to a jury trial. Part I of this brief, however, points out that the element of knowledge was fully and validly subsumed in the court's instruction on the intent to control. The jury therefore passed on all questions relevant to the mens rea of the defendant, and no sixth amendment problem arose.

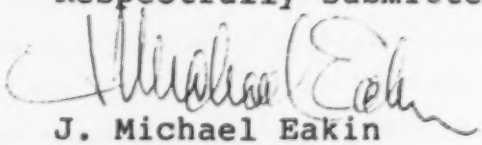
III. REVIEW BY THIS COURT IS UNNECESSARY AS NO DENIAL OF A FEDERAL RIGHT IS INVOLVED.

The defendant likens his present claim to issues of such constitutional dimension as the presumption of innocence and the right to remain silent. As Part I of this brief pointed out, however, the defendant's attempt to give federal scope to what is really a matter of state law must fail. The courts below did not ignore the defendant's claim. The issues were properly reviewed and his present ground of appeal was rejected because the state law of Pennsylvania was satisfied by the instruction given to the jury by the trial court. If the instructions satisfied the procedures required by state law, no federal constitutional questions exist for this Court to address.

CONCLUSION

WHEREFORE, the Commonwealth requests this Honorable Court to reject the defendant's application for a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,



J. Michael Eakin
District Attorney

A1

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT
	:	OF PENNSYLVANIA
VS	:	
	:	
JEFFREY WAYNE ABBETT,	:	
Appellant	:	No. 02027 Philadelphia 1982

APPEAL FROM THE JUDGMENT OF SENTENCE OF JULY 8, 1982 IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, CRIMINAL NO. 907, 1981

BEFORE: CAVANAUGH, CIRILLO and WATKINS, JJ.

MEMORANDUM OPINION:

On February 17, 1982 the appellant, Jeffrey Wayne Abbett, was tried by the Honorable Dale F. Shughart and a jury and convicted of unlawful possession with intent to deliver a Schedule I controlled substance.[1] Post verdict motions for a new trial and in arrest of judgment were timely filed and denied. Then, on July 8, 1982, the appellant was fined $2,500.00 and sentenced to a term of imprisonment of not less than two years nor more than four years. This appeal followed.

The appellant raises eleven issues for our review involving: sufficiency of the evidence; the trial court's denial of his motion to suppress; the testimony of the prosecution's expert witness; the trial court's failure to conduct an instruction conference; and the trial court's failure to give various jury instructions requested by the appellant. We find no merit to any of these contentions.

---

[1]Act of April 14, 1972, P.L. 233, No. 64, §13, as amended, 35 P.S. §780-113(a)(30).

The comprehensive Opinion of the trial court en banc (Shughart, P.J., Sheely, J. and Hoffer, J.) thoroughly examines all of the issues preserved for review by this Court. Accordingly, we adopt this Opinion as our own for purposes of allocatur.

Judgment of sentence affirmed.

B1

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA
	:	
	:	907 CRIMINAL 1981
	:	
v.	:	CHARGE: UNLAWFUL POSSESSION OF A SCHEDULE I CONTROLLED SUBSTANCE WITH INTENT TO DELIVER
	:	
JEFFREY WAYNE ABBETT	:	AFFIANT: TPR. ANDREW KORNOVA

IN RE: MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Before SHUGHART, P.J., SHEELY, J. and HOFFER, J.

ORDER OF COURT

AND NOW, June 17, 1982, for the reasons appearing in the opinion filed this date, the defendant's motions in arrest of judgment and for a new trial are denied. The Probation Office is directed to prepare a pre-sentence report after which the District Attorney shall schedule the case for sentencing.

By the Court,

Dale F. Shughart, P.J.

J. Michael Eakin, Esquire
Assistant District Attorney

James M. Shellow, Esquire
David J. Foster, Esquire
For Defendant

:dp

A TRUE COPY FROM RECORD

This 18th day of June, 1982

Deputy

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA
	:	
	:	907 CRIMINAL 1981
	:	
v.	:	CHARGE: UNLAWFUL POSSESSION OF A SCHEDULE I CONTROLLED SUBSTANCE WITH INTENT TO DELIVER
	:	
JEFFREY WAYNE ABBETT	:	AFFIANT: TPR. ANDREW KORNOVA

IN RE: MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Before SHUGHART, P.J., SHEELY, J. and HOFFER, J.

OPINION and ORDER OF COURT

The defendant filed motions in arrest of judgment and for a new trial following his conviction by a jury on the charge of possession with intent to deliver a controlled substance.[1] Viewed in the light most favorable to the Commonwealth, the evidence showed that the defendant was driving a van westbound on the Pennsylvania Turnpike at approximately 2:50 a.m. on October 16, 1981. At about three and a half miles east of the Carlisle interchange, the van was observed by two troopers of the Pennsylvania State Police. The troopers stopped the van for a violation of the Vehicle Code--

[1] The Controlled Substance, Drug, Device and Cosmetic Act of April 14, 1972, P.L. 233, No. 64, §13(a)(30), as amended, 35 P.S. §780-113(a)(30).

operating a television visible to the driver.[2] Upon approaching the van, one of the troopers observed, in plain view, a brick of suspected marihuana protruding from an open cardboard box, which was located about two feet from the rear window of the van. This box was atop several others. A search conducted pursuant to a validly executed search warrant disclosed that the boxes contained a total of approximately 251 pounds of marihuana. The defendant was convicted of possession with intent to deliver on February 17, 1982.

I

In his motion in arrest of judgment, the defendant first raises the issue of venue. He alleges that "[t]his court is without jurisdiction over the offense, in that the prosecution failed to prove that the offense was committed within the venue of Cumberland County." Defendant's Amended Motion in Arrest of Judgment ¶1. The applicable law fails to support the defendant's position.

The law regarding jurisdiction over criminal cases is well settled. In short, the subject matter jurisdiction of this court in criminal matters extends only to offenses committed within Cumberland County, unless otherwise provided by statute. See Commonwealth v. Mull, 316 Pa. 424, 175 A. 418 (1934); Commonwealth v. Simeone, 222 Pa. Superior Ct. 376, 294 A.2d 921 (1972). Consequently, "the locus of a crime is always in issue." Mull, 316 Pa. at 426, 175 A.2d at 419. The Commonwealth has the burden of proving the court's jurisdiction, Commonwealth ex rel. Chatary v. Nailon, 416 Pa. 280, 206 A.2d 43 (1965), which is a legal issue, normally

[2]Vehicle Code of June 17, 1976, as amended, 75 Pa.C.S.A. §4527.

decided by the trial judge. Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 225 (1973); Commonwealth v. Ohle, ___ Pa. Superior Ct. ___, 435 A.2d 592 (1981). Only when jurisdiction depends upon the resolution of disputed facts is it a question for the jury. Mull, supra; Ohle, supra; Commonwealth v. Kloss, 253 Pa. Superior Ct. 559, 385 A.2d 480 (1978); Commonwealth v. Wojdakowski, 161 Pa. Superior Ct. 250, 53 A.2d 851 (1947). When the locus of the crime is uncontested and only "technically in issue,"[3] the court can take judicial notice of it being in the county of the court's jurisdiction, Commonwealth v. Lawrence, 282 Pa. 128, 127 A. 465 (1925); Commonwealth v. Varner, 265 Pa. Superior Ct. 329, 401 A.2d 1235 (1979), even if the evidence is very slight. Commonwealth v. Kaiser, 184 Pa. 493, 39 A. 299 (1898).

Applying this law to the facts of the instant case, we conclude that the Commonwealth has met its burden. Although none of the Commonwealth's witnesses explicitly testified that the offense was committed in Cumberland County, one of its witnesses, Trooper Kornova of the Pennsylvania State Police, did testify that the van operated by the defendant, within which the contraband was being transported, was pulled over at milepost 228.3 on the Pennsyl-

[3] When the jurisdiction, or venue, of the court is undisputed and unchallenged by the criminal defendant, before or during trial, and raised for the first time in post-trial motions, both the Pennsylvania Supreme and Superior Courts have considered the locus of the crime as being "technically in issue," allowing judicial notice to be taken at the post-trial stage of the proceedings. See Commonwealth v. Kaiser, 184 Pa. 493, 39 A. 299 (1898); Commonwealth v. Varner, 265 Pa. Superior Ct. 329, 401 A.2d 1235 (1979).

vania Turnpike. N.T.10.[4] Just moments before, the trooper had testified that the van was first observed at milepost 228.4, approximately three and a half miles east of the Carlisle interchange. N.T.9. It is a well-known geographic fact among the people of Cumberland County that the area three and a half miles east of the Carlisle interchange on the turnpike is within the boundaries of Cumberland County. Indeed, the turnpike runs east through Cumberland County to a point east of the Gettysburg Pike interchange, near Mechanicsburg at the eastern end of the county, well beyond the Carlisle interchange. Nowhere in the record is there evidence that the locus of the crime was contested by the defendant. Since it is well known that the locus of the crime as identified in the record is within Cumberland County, this court, at this point in the proceedings, could take judicial notice to satisfy the jurisdictional requirement. Commonwealth v. Varner, 265 Pa. Superior Ct. 329, 401 A.2d 1235 (1979).[5] That is not required, however, since, per defense counsel's request, the matter was put before the jury. The guilty verdict returned by the jury conclusively establishes its acceptance of the uncontroverted testimony regarding the locus of the crime.

---

[4]Page references are to the Notes of Testimony of the February 16-17, 1982, jury trial.

[5]In Varner, the Pennsylvania Superior Court affirmed the action by the Court of Common Pleas of Franklin County in overruling the defendant's post-trial motion on the issue of jurisdiction. The trial court had taken judicial notice that the area near the Shippensburg Fair Grounds was within Franklin County. Like the instant case, none of the witnesses had specifically stated that the locus of the crime was within the county of the court trying the case.

The remaining grounds for the defendant's motion in arrest of judgment go to the sufficiency of the evidence. First, the defendant contends that the Commonwealth failed to prove the defendant's constructive possession of marihuana.

The law pertaining to the element of possession in drug-related cases can be summarized as follows: Whether the evidence is sufficient to establish possession turns on the individual facts of the case. Commonwealth v. Ferguson, 231 Pa. Superior Ct. 327, 331 A.2d 856 (1974). Mere presence at the site of the controlled substance is not enough to show possession, Commonwealth v. Townsend, 428 Pa. 281, 237 A.2d 192 (1968); instead, the Commonwealth must prove that the defendant had the intent to exercise conscious dominion and control over the substance. Commonwealth v. Rambo, 488 Pa. 334, 412 A.2d 535 (1980); Commonwealth v. Fortune, 456 Pa. 365, 318 A.2d 327, (1974); Commonwealth v. Fassett, 260 Pa. Superior Ct. 323, 394 A.2d 573 (1978). These elements may be proved by circumstantial evidence--inferred from the totality of the surrounding circumstances. Fortune, supra; Commonwealth v. Shaffer, 447 Pa. 91 288 A.2d 727, cert. denied, 409 U.S. 867 (1972); Ferguson, supra. See also Commonwealth v. Minoske, ___ Pa. Superior Ct. ___, 441 A.2d 414 (1982). When the controlled substance is not found on the defendant, the Commonwealth must prove constructive possession. Commonwealth v. Stokes, ___ Pa. Superior Ct. ___, 440 A.2d 591 (1982). A showing of joint constructive possession is enough to sustain a conviction. Commonwealth v. Gilchrist, 255 Pa. Superior Ct. 252,

386 A.2d 603 (1978) (per curiam). In other words, a conviction can be secured even though another individual had equal access to the controlled substance. Factors supporting an inference of possession include, inter alia, the close proximity of the defendant to the controlled substance, Commonwealth v. Gill, 490 Pa. 1, 415 A.2d 2 (1980), the plain view of the substance, Gilchrist, supra, its easy access to the defendant, id., and the defendant's actions, such as his attempt to conceal it, Shaffer, supra. To obtain a conviction for possession with intent to deliver a controlled substance (35 P.S. §780-113(a)(30)), the Commonwealth must additionally prove that the defendant had the intent to deliver. Commonwealth v. Bagley, ___ Pa. Superior Ct. ___, 442 A.2d 287 (1982). Such an intent may be inferred from the quantity of drugs discovered. Commonwealth v. Santiago, 462 Pa. 216, 340 A.2d 440 (1975).

When viewed in the light most favorable to the Commonwealth,[6] the evidence is sufficient to show that the defendant constructively

---

[6] In passing upon the defendant's motion in arrest of judgment, the sufficiency of the evidence must be evaluated upon the entire trial record. All of the evidence must be read in the light most favorable to the Commonwealth and it is entitled to all reasonable inferences arising therefrom. The effect of such a motion is to admit all the facts which the Commonwealth's evidence tends to prove. (Citations omitted.) Also, in passing upon such a motion, all evidence actually received must be considered, whether the trial rulings thereon were right or wrong. (Citations omitted).

Commonwealth v. Tabb, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965).

possessed marihuana. The evidence showed that the defendant and codefendant DiMatteo were the only two occupants of the van, N.T. 16; that the defendant was the driver, N.T. 11; that an "overpowering" odor or marihuana eminated from the van, N.T. 17-18; that a brick of marihuana was in plain view, N.T. 13; that the defendant had easy access to the marihuana from the passenger area of the van, N.T. 17; and that the van contained a large quantity of marihuana (seven boxes and four bundles, N.T. 27)(nearly 251 pounds, N.T. 177-78). In addition, the defendant attempted to conceal the exposed brick of marihuana after having been requested to hand it over to the trooper. N.T. 18 & 169. From the totality of these circumstances, the jury could readily infer that the defendant not only knew of the marihuana but also had the ability and intent to exercise control over it.

Similarly, the jury could conclude, based on the evidence before it, that the substance found in the van was indeed marihuana. In his motion in arrest of judgment, the defendant challenges the Commonwealth's case on this point; the defendant contends that the Commonwealth "failed to prove by competent expert testimony that the seized substance was marihuana." Defendant's Amended Motion in Arrest of Judgment ¶3. Specifically, the defense argues that in the absence of testimony concerning the purported standard relied upon in the thin-layer chromatographic test, the expert testimony by the chemist was insufficient to support the guilty verdict. Defense counsel had objected at trial to the chemist's testimony concerning the test on the grounds of lack of foundation. Counsel argued that testimony concerning the tests that were run on the standard was required. N.T. 96.

Although the identification of drugs may be proved by circumstantial evidence only, without chemical analysis, Commonwealth v. Williams, 285 Pa. Superior Ct. 515, 428 A.2d 165 (1981), the Commonwealth in the instant case offered to the jury the benefit of testimony by an expert, employed in the Pennsylvania State Police Crime Laboratory, who had conducted chemical tests on samples of the seized substance. The witness's experience was extensive (more than 10,000 prior specimen examinations). N.T. 77. Furthermore, he had not relied upon merely one test in identifying the substance as marihuana; in addition to the thin-layer chromatographic test, the chemist had visually examined the substance, conducted microscopic examinations, and conducted the modified Duquenois-Levine color test. N.T. 92-95. Thus, even if the testimony of the thin-layer chromatography would have been excluded, the remaining testimony was still sufficient to sustain the conviction. See Commonwealth v. Leskovic, 227 Pa. Superior Ct. 565, 307 A.2d 357 (1973). The chemist testified that the standard used by him was certified. N.T. 97. His failure to somehow personally test the standard went to the weight of his testimony, not to its admissibility. Commonwealth v. Kinkead, 257 Pa. Superior Ct. 307, 390 A.2d 836 (1978) (Van der Voort, J., with one Judge concurring and one Judge concurring in the result), aff'd, 494 Pa. 321 431 A.2d 280 (1981) (per curiam).[7] Defense counsel extensively cross-examined the chemist on this particular test. See N.T. 108-14,

[7]Defense counsel has cited no Pennsylvania cases in support of his position.

117-25 & 145-48. Viewed in its entirety, the record amply supports a conclusion that the seized substance was marihuana.

In his final plea for an arrest of judgment, the defendant generally asserts that he is not guilty upon the law and evidence. A thorough view of the entire trial record, drawing all reasonable inferences in favor of the Commonwealth, leads us to the inescapable conclusion that a guilty verdict is well supported. Accordingly, the defendant's motion in arrest of judgment cannot be granted.

II

The defendant raises multiple points in support of his motion for a new trial, the first one being that the court erred in denying his suppression motion. Defense counsel argued in his brief in support of the motion to suppress that the affidavit in support of the warrant to search the van contained a deliberate, material false statement by the affiant, vitiating the search and requiring suppression of the seized marihuana.[8] Thus, the validity of the warrant is the only issue here.

In particular, the defendant takes issue with the last paragraph of the trooper's affidavit, which reads:

[8]All of the marihuana was the fruit of this search except for the brick protruding from the box in plain view, which was seized immediately after the initial stop on the turnpike.

> The undersigned believes that the subject van contains large quantities of marijuana by virtue of the presence of numerous other boxes matching the one in which the large brick of marijuana was observed. The presence of this amount of marijuana is also apparent because of the intense odor in the van.

(Emphasis added.) During cross-examination of the affiant at the suppression hearing, defense counsel focused on the physical descriptions of the box from which the marihuana was protruding in plain view and those beneath. Notes of Testimony from February 2, 1982, Suppression Hearing 20-33. His obvious purpose was to show that the boxes were not "matching," as stated in the affidavit.

The law is clear on this matter: A warrant is invalid and any evidence obtained pursuant to that warrant is inadmissible when the detached and objective determination by a magistrate is negated by a knowing misstatement of a material fact by the police officer. Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970). First, there must be a "misstatement." Id. In the instant case, defense counsel argues that "matching" connotes "equal" or "identical," and as evidenced by the affiant's testimony, the boxes were not identical but had several distinguishing characteristics. The affidavit itself, however, suggests that by describing the boxes as matching, the affiant was indicating that they were similar, at least in some characteristics. In fact, on the first page of the affidavit the affiant relates having observed "numerous other similar boxes." (Emphasis added.)

Assuming arguendo that use of the word "matching" constituted an improper comparison of the boxes, the warrant is neverthe-

less valid. There is no reason to believe that the alleged misstatement was deliberate or knowing. "If . . . the affiant [had] a reasonable belief in the truthfulness of the information contained in the affidavit, even though a mistaken one, the fourth amendment's protection against unreasonable search and seizure is not violated." Commonwealth v. Bradshaw, ___ Pa. Superior Ct. ___, ___, 434 A.2d 181, 183 (1981). We conclude that he had a "reasonable belief" in the truthfulness of his affidavit. Moreover, the alleged misstatement was not material. For a falsity to render a search invalid, it must be material; that is, it must be a fact without which probable cause to search would not exist. Commonwealth v. Jones, 229 Pa. Superior Ct. 224, 323 A.2d 879 (1974). The mere presence of a falsity is not enough. Commonwealth v. Tucker, 252 Pa. Superior Ct. 594, 384 A.2d 938 (1978). The test was enunciated by the superior court in Commonwealth v. Yucknevage, 257 Pa. Superior Ct. 19, 390 A.2d 225 (1978):

> In deciding whether a misstatement is material, however, the test is not whether the misstatement strengthens the application, but rather it is essential to it. This is determined by deleting the misstatement from the application, and then seeing whether the application still states enough to show probable cause. (Citations omitted.)

Id. at 24, 390 A.2d at 227. Applying this test to the affidavit in question, we can readily conclude that probable cause existed even without taking into account the characterization of the other boxes as "matching." Accordingly, the search warrant is

valid and the suppression motion was properly overruled.[9]

Next, the defendant claims a denial of his right of confrontation as a result of the limits imposed by the court on the defense's cross-examination of the chemist. While we are well aware that the sixth amendment right of confrontation guarantees a state criminal defendant certain rights to cross-examination of prosecution witnesses, Davis v. Alaska, 415 U.S. 308 (1974), we have no difficulty in concluding that the defendant took full advantage of this right without prejudicial interference by the trial judge. Defense counsel's cross-examination, which covered sixty-three pages of the record, was detailed and extensive. Regarding the defendant's multiple species defense, that issue has been laid to rest by our superior court in Commonwealth v. Martin, 277 Pa. Superior Ct. 326, 419 A.2d 795 (1980), where, like the instant case, the defendant argued that the Commonwealth failed to prove that the marihuana was Cannabis sativa L. as distinguished from other species of Cannabis. The Commonwealth's expert testified in Martin that the substance was marihuana and that Cannabis sativa L. was the only species of marihuana. Similar testimony was

[9]By upholding this search on the basis of a validly executed search warrant, we in no way mean to imply that a search warrant was required in this case. See generally United States v. Ross, 50 U.S. L.W. 4580 (June 1, 1982). Whether the search could have been conducted pursuant to the automobile exception to the fourth amendment warrant requirement is a question we need not decide in light of our denial of the suppression motion on the grounds stated.

received in this case. See N.T. 99 & 133. Furthermore, in both cases the defendant offered no evidence on this point. Consequently, we are bound by the superior court's rejection of defendant's position in Martin.

As his fifth point for a new trial, the defendant takes issue with the absence of an instruction conference prior to trial arguments, although he cites no Pennsylvania law requiring such a conference. It has not been the practice of the trial judge to hold a pre-argument instruction conference, and our reading of Pa.R.Crim.P. 1119 leads us to believe one is not required. Rule 1119(a) reads:

> Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereto shall be furnished to the other parties. The trial judge shall charge the jury after the arguments are completed, and shall then rule on all written requests.

(Emphasis added.) The record clearly indicates that defense counsel was not prejudiced by proceeding with his closing argument without the benefit of the court's rulings. In fact, counsel was told that "[i]f there [was] some particular matter [he wanted] to know whether [he] should cover in [his] address [the judge would] discuss that with [him]." N.T. 184. Accordingly, the defendant's objection is without merit.

The remaining grounds advanced in support of the defendant's motion for a new trial all concern the court's charge to the jury. First, the defendant contends that the court erred in

failing to give an instruction concerning the lesser included offense of simple possession. A review of the record, however, reveals that the absence of such a charge does not necessitate a new trial.

Specifically, defense counsel did not make a timely request for a lesser-included-offense instruction. Although in his brief the defendant argues that requested instruction number 29 constituted such a request, our reading of that instruction reveals that the defendant requested a binding instruction on the jury to find the defendant not guilty of simple possession; the request was not for a lesser-included-offense instruction. Requested instruction number 29 reads: "Upon the law and all the evidence you must find the defendant not guilty of the crime of simple possession of marijuana." (Emphasis added.) Moreover, the record reveals that defense counsel requested a lesser-included-offense instruction only after the court had given the general charge and a subsequent specific instruction on venue per defendant's request. N.T. 197. The request coming at this point in the proceedings was not timely. Rule 1119(a) indicates that requests for jury instructions should come prior to closing arguments. See also Commonwealth v. Gardner, 246 Pa. Superior Ct. 582, 371 A.2d 986 (1977); Commonwealth v. Lawrence, 58 West. 174 (1976). The court was not required to instruct on a lesser included offense absent a timely defense request, see Commonwealth v. Johnson, 460 Pa. 493, 333 A.2d 881 (1975), and the defendant's failure to make a timely request

constituted a waiver.[10]

Lastly, the defendant contends that the court erred when it failed to give requested instructions numbers 3-6, 8, 16, 19, 23, 24, 27 and 34. Our review of the record reveals, however, that the general charge covered many of the points requested in these specific requests, although the wording of the defendant's points was not used. All requested instructions concerning the possessory element of the crime were adequately covered. The defendant is entitled to have the jury instructed as to the law, but not to have his requested instructions read verbatim. Commonwealth v. Gardner, 246 Pa. Superior Ct. 582, 371 A.2d 986 (1977).

---

[10] Untimely requests must be discouraged to prevent unending specific instructions subsequent to the general charge which could serve to confuse the jury and place undue weight on those matters that were last raised. The prospect for tactical maneuvering to gain an advantage in the minds of the jurors leads us to view with disfavor last minute requests.

In the alternative, we find that a lesser-included-offense instruction was inapplicable to the presented facts of this case and was not required even if a timely request had been made. The defendant cites Commonwealth v. Wilds, 240 Pa. Superior Ct. 278, 362 A.2d 273 (1976), for the proposition that an instruction for possession should have been given since the elements of that offense are included within the charge of possession with intent to deliver. In Wilds, however, the police seized less than five pounds of marihuana. In the instant case, more than 251 pounds of marihuana were seized. The evidence simply does not support a conviction for simple possession, thus none was required. See Commonwealth v. White, 490 Pa. 179, 415 A.2d 399 (1980). It is not a rational conclusion that the defendant would have possessed 251 pounds of marihuana for his personal use. The most likely effect of a lesser-included-offense instruction in this case would be to provide an opportunity to a jury that might otherwise acquit the defendant to reach a compromise verdict of simple possession. The Commonwealth took the position, and we agree, that the defendant was either guilty of possession with intent to deliver or he was guilty of nothing.

Admittedly, several requested instructions were not covered. These instructions had no applicability to the case and were properly refused. See Commonwealth v. Showalter, 275 Pa. Superior Ct. 1, 418 A.2d 580 (1980). The evidence did not justify instructions on fleeting possession (instruction no. 8), production of weaker evidence when stronger evidence was available (instruction no. 12), or destruction of evidence (instruction on. 34). When viewed in its entirety, the charge is adequate and does not taint the decision reached by the jury, a decision unquestionably supported by the evidence presented at trial.

In sum, our review of the entire record leaves us with no doubt that the defendant received a fair trial to which he was entitled. Moreover, the verdict reached by the jury was based upon sufficient evidence. None of the reasons advanced by the defendant justify the granting of his motions in arrest of judgment and for a new trial.

ORDER OF COURT

AND NOW, June 17, 1982, for the reasons appearing in the opinion filed this date, the defendant's motions in arrest of judgment and for a new trial are denied. The Probation Office is directed to prepare a pre-sentence report after which the District Attorney shall schedule the case for sentencing.

By the Court,

/s/ Dale F. Shughart, P.J.

J. Michael Eakin, Esquire
Assistant District Attorney

James M. Shellow, Esquire
David J. Foster, Esquire
For Defendant